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Supreme Court of the United States

UFO CHUTING OF HAWAII, INC., A HAWAII CORPORATION, AND K.M.B.S., INC., A HAWAII CORPORATION D/B/A KAANAPALI TOURS, PETITIONERS

v.

ALLAN A. SMITH, CHAIR AND ACTING DIRECTOR OF THE BOARD OF LAND NATURAL RESOURCES, STATE OF HAWAII; STEPHEN THOMPSON; AND ED UNDERWOOD, ADMINISTRATOR OF THE DIVISION OF BOATING AND OCEAN RECREATION, DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAII

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF TO FEDERAL RESPONDENTS

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STATEMENT OF POINTS IN REPLY

1. The Marine Mammal Protection Act, 16 U.S.C. § 1361 *et seq.* (the "MPPA") illustrates the misconception of the lower courts that protection of pelagic marine mammals involved a field traditionally occupied by the states and provides context for evaluating the putative justification for the seasonal ban of Petitioners' vessels.

2. It is the character of a final judgment that determines eligibility for attorney's fees under 42 U.S.C. § 1988 ("Section 1988"). Tying fees to a fortuitous postjudgment circumstance, as did the courts below, undermines the remedial purpose of the statute.

DISCUSSION

I. THE SUPREMACY CLAUSE QUESTION IS FRAMED ADEQUATELY.

Federal Respondents join their state counterparts in questioning whether the first question presented subsumes the Supremacy Clause issue that arises from the conflict between the seasonal ban of Petitioners' vessels and their federal rights of coastwise navigation. FR Brief at 7 n.3. The contention is misplaced.

Protection of a single species of marine mammal was the putative purpose of the five month ban of the operation of Petitioners' vessels. *Locke v. United States*, 529 U.S. 89, (2000) ("*Locke*") required the courts below to balance the extent to which the ban actually contributes to the protection of humpback whales

against the operating rights Petitioners enjoy under their federal licenses. Instead, the lower courts presumed the ban reasonable and placed on Petitioners a burden of proof ill-suited to the task.

Those courts, as well as Federal Respondents, misunderstand that vessels operating under federal licenses of the sort held by Petitioners enjoy federal rights of navigation that this Court long ago ruled trump conflicting state regulation. *See Gibbons v. Ogden,* 22 U.S. 1, 221 (1824) (finding State law inhibiting the use of steam to power a vessel "having a license under the act of Congress, comes, we think, in direct collision with that act"). That Petitioners' vessels were similarly licensed was never in dispute. This supplied the predicate for their reliance on *Locke* in making the argument that the lower courts employed the wrong paradigm in upholding the ban as a reasonable exercise of the state's subordinate power to regulate the operation of licensed vessels on navigable waters. Preemption analysis, as that case makes clear, does not begin with an assumption of no conflict, particularly where a state regulatory measure affects federally licensed vessels to the extent of the seasonal ban. The MMPA is relevant to that analysis because it provides a standard for measuring the state's conclusion that nothing short of a total ban of Petitioners' vessels would bring an incremental increase in the protection already afforded whales under federal whose necessity outweighs impact. Petitioners submit the first question of the petition adequately raises the preemption issue that clearly exists in view of *Locke.*

II. PETITIONERS' ENTITLEMENT TO FEES IS DETERMINED BY THE RELIEF CREATED BY THE FINAL JUDGMENT.

Federal Respondents' opposition rests on the flawed premise that "prevailing party" status may be lost as a result of a change in law occurring after entry of final judgment. No prior decision, whether of this Court or any lower court, has so held. As for the "well-settled" principle attributed to *Hensley*, the issue there was not entitlement but the amount of fees where an applicant achieves "only limited success." *Hensley v. Eckerhart*, 461 U.S. 424, 431 (1983).

In alluding to "a typical formulation" of the prevailing party standard, this Court referred to some success which advances a purpose of the litigation. *Id.* at 433, 1939. That formulation, however, should not be read as exclusive and certainly not as conditioning prevailing party status on actual enforcement of the judgment. Doing so adds a gloss to the common understanding of the term "prevailing party" that disserves the salutary purpose of Section 1988.

Hensley notes the standard for determining whether a fee applicant is a "prevailing party" has been framed variously to take account of the different ways in which a party may be said to prevail. *Id.* But *Buckhannon* affirms what Petitioners argued below. *Buckhannon Bd. and Care Home, Inc. v. West Va. Dept. of Health & Human Res.*, 532 U.S. 598 (2001). Congress in using the term "prevailing party" intended to qualify for fees those parties who win their cases, a standard characterized by common understanding and unaffected by post-judgment changes in the law.

In designating those parties eligible for an award of litigation costs, Congress employed the term

"prevailing party," a legal term of art. Black's Law Dictionary 1145 (7th ed.1999) defines "prevailing party" as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded in certain cases, the court will award attorney's fees to the prevailing party. Also termed *successful party*." This view that a "prevailing party" is one who has been *awarded* some relief by the court can be distilled from our prior cases.

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> ***In addition to judgments on the merits***, we have held that settlement agreements enforced through a consent decree may serve as the basis for an award of attorney's fees.
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> . . . .
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> . . . These decisions, taken together, establish that enforceable judgments on the merits and court-ordered consent decrees ***create*** the "material alteration of the legal relationship of the parties" necessary to permit an award of attorney's fees.

Buckhannon Bd. and Care Home, Inc. v. West Va. Dept. of Health & Human Res., 532 U.S. 598, 603-604 (2001) (second and third emphasis supplied; citations omitted).

The operative phrase is "create." A final judgment on the merits "creates" the requisite change in the parties' legal relationship, and thus serves as the basis for a fee award. *Id.* The federal government does not deny that Petitioners were prevailing parties on entry of final judgment. They enjoyed that status when they applied for fees. Actual outcome may be important in deciding whether a preliminary injunction or consent decree provides the predicate for fees. But

until this case the common understanding of "prevailing party" was "the party that wins the suit or obtains a finding (or an admission) of liability." *Id.* at 615 (Scalia, J., concurring). The panel clearly erred in assigning a different meaning to the phrase.

Nothing in *Sole v. Wyner*, 127 S.Ct. 2188 (2007) is to the contrary. There the fee applicant won a preliminary injunction but lost on the merits. *Id.* at 2190. The district court, after opportunity to develop a record, rejected the premise on which it had granted preliminary relief -- that a screen would protect the public from unwanted views of nudists -- and granted the city summary judgment. *Id.* at 2196. The preliminary injunction adjudicated nothing.

On these facts, the court viewed the preliminary ruling as ephemeral and not qualifying applicant as a "prevailing party." *Id.* Left open was the question "whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees." *Id.* In contrast here, Petitioners had in hand a final decision on the merits of a claim for permanent injunctive relief at the time they applied for fees.

This Court has not had occasion to decide whether the policy underlying the fee-shifting statute warrants revisiting the common understanding of the term "prevailing party." The petition should be granted to correct the panel's view that prevailing party status is lost as a result of a post-judgment, post-fee application change in law, a decision that is at variance with the common understanding of "prevailing party," and which disserves the purpose of Congress in adopting section 1988.

CONCLUSION

The petition for a writ of certiorari should be granted as to both the preemption and attorney's fee questions.

Respectfully submitted,

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